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September 11, 2008

Via Hand Delivery

The Honorable Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S W
Washington, DC 20024

ENTERED
Office of Proceedings

SEP 11 2008

Part of
Public Record

Re Finance Docket No 34943
Beaufort Railroad Company, Inc - Modified Rail Certificate

Dear Ms. Quinlan:

Enclosed please find an original and ten (10) copies of a Reply in Opposition to Response and Motion to Strike in the above-referenced docket.

Kindly date stamp the additional copy of this letter and Reply and return the same to our courier.

If you have any questions regarding the enclosed, please contact me at the telephone number listed above.

Very truly yours,

Derek F. Dean

Enclosures

cc Mr. McWhorter (via facsimile only w/o enc)



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**Beaufort Railroad Company, Inc., a subsidiary of
the South Carolina Division of Public Railways -
Modified Rail Certificate**

Finance Docket: 34943

REPLY IN OPPOSITION TO RESPONSE AND MOTION TO STRIKE

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REPLY IN OPPOSITION TO RESPONSE AND MOTION TO STRIKE

Beaufort Railroad Company, Inc. ("BRC"), the South Carolina State Ports Authority ("SCSPA") and the Beaufort-Jasper Water and Sewer Authority ("BJWSA" and collectively with BRC and SCSPA, the "South Carolina Parties") submit their Reply in Opposition (the "Opposition") to the Response and Motion to Strike (the "Response") filed by Clarendon Farms, LLC, Diane D. Terni, Greedy Children Land, LLC, Prodigal Son, LLC, Mr. and Mrs. William M. Mixon, Dekock SA, Trustee of the JC and AJ Harden Irrevocable Trust, and Ray Basso (collectively, the "Landowners"). In support of their Opposition, the South Carolina Parties state the following:

Background

On March 19, 2008, the Surface Transportation Board (the "Board") issued its Decision¹ denying all petitions for reconsideration and a request for investigation of a December 2006 notice of filing of a modified certificate of public convenience and necessity under 49 C.F.R. §§ 1150.21-23 for operation of the Port Royal Railroad Line (the "Line") in South Carolina. The Board found that the Line had not been abandoned, that the Line remained a part of the interstate rail system, and that the Board retained jurisdiction to authorize BRC's operation pursuant to the modified certificate. See Decision at 1. The Board also sanctioned possible

¹ The Board's Decision was served on March 19, 2008. The Decision hereinafter will be referred to as the "Decision"

interim trail use for the Line in the event that BRC (the operator on the Line) terminated its service obligations, so long as SCSPA (the owner of the Line) found an interested party to use the Line in a manner consistent with the statutory and regulatory requirements of the National Trails System Act (the “Trails Act”) See Decision at 9.

On July 16, 2008, having determined that current need for service over the Line was unlikely and also having found an interested party to use the Line for interim trail use, the South Carolina Parties filed a Notice of Intent to Terminate Service and Request for Issuance of Notice of Interim Trail Use/Rail Banking (the “Notice & Request”).² In the Notice & Request, the South Carolina Parties seek termination of service over the Line and a concurrent issuance of a Notice of Interim Trail Use (“NITU”) to rail bank the Line, pursuant to the Trails Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. On August 22, 2008, the Landowners filed their Response to the Notice & Request.

Argument

The Response represents yet another inexplicable attempt by the Landowners to challenge the South Carolina Parties’ rights regarding the Line and demonstrates the Landowners’ stubborn refusal to accept the Board’s well-reasoned Decision. The Landowners fail to present any arguments that would prevent the South Carolina Parties from obtaining a termination of BRC’s modified rail certificate and a NITU to preserve the Line for future rail

² BRC requested that a NITU be issued within 60 days of the July 16, 2008 filing, i.e., on or before September 14, 2008. BRC will not effect termination until a NITU is issued. Similarly, in *Sammamish Transportation Company*, STB Finance Docket No. 33398 (Sub-No. 1), STC did not effect its notice of termination until railbanking authorization was issued.

use. For the following reasons, the Board should reject the Landowners' arguments and deny the Landowners' request to strike the Notice & Request as improperly filed.

First, the Landowners completely ignore the Board's Decision by attempting to dispute SCSPA's ownership of the Line.³ The assertion that the Landowners are the "rightful owners" of the Line is a material misrepresentation to the Board of the facts in this proceeding

In the Decision, the Board conclusively determined that the SCSPA had not abandoned the Line under federal law.⁴ See Decision at 7. Furthermore, there has been no credible suggestion that the Line has been abandoned under the property laws of the State of South Carolina. Therefore, Landowners have no vested property rights in the Line. Yet in their Response, the Landowners assert – without evidence or support – that they are the "rightful owners" of the Line. See Response at 2. It is impossible (and unnecessary to attempt) to reconcile the facts and law with the Landowners' current argument. Any questions of reversionary property interests or ownership interests properly are determined under South Carolina state property law, not federal railroad transportation law, and a South Carolina state court, not the Board, is the appropriate forum for resolution of such state law questions. The Board already determined that SCSPA did not abandon the Line. Therefore, the Landowners'

³ The Landowners allege: "The South Carolina Parties' Notice and Request is only the latest step in an improper continuing effort by those parties to retain control of property *they do not own* and that should be returned to the rightful owners." Response at 2 (emphasis added).

⁴ Based on facts undisputed by the Landowners and other petitioners, the Board determined that SCSPA had not abandoned the Line. SCSPA maintained the right-of-way on the PRR Line since 1985, ever since it acquired control of the Line. One only needs to access Google Earth to see that the rails are still there. SCSPA has done nothing to cede ownership of the Line or abandon the Line.

injection of such improper and unsubstantiated claims in this proceeding is a misuse of the Board's regulatory processes.

As the owner of the Line, SCSPA is entitled to preserve it as a rail line either by maintaining the Line as a railroad line for potential service to shippers under the modified rail certificate or by preserving the Line for future rail service by "rail banking" the Line pursuant to the Trails Act. SCSPA has determined that the better economic use of the Line, at the present time, is to terminate BRC's modified rail certificate and rail bank the Line, and SCSPA is entirely within its rights under federal statutory law and the Board's regulations and as owner of the Line to bank the Line and preserve it for future railroad use.⁵

Second, the South Carolina Parties have complied with this Board's regulations and all applicable federal statutes in their efforts to preserve the Line as a viable segment of the nation's rail transportation system. Both the previous request for issuance of a modified rail certificate and the current request to terminate the certificate and obtain a NITU are authorized and

⁵ The Landowners also take issue with the concurrent filing of the notice of termination and request for interim trail use because the notice of termination is contingent on the issuance of a notice of interim trail use. See Response at 5. The concurrent filing of a notice of intent to terminate service under a modified certificate and a request for issuance of a notice of interim trail use is not uncommon and is not prohibited by any applicable statute or regulation. See, e.g., *South Dakota Railway Co. – Notice of Interim Trail Use and Termination of Modified Rail Certificate*, STB Finance Docket No. 31874 (July 16, 2007); *D & I Railroad Co – Notice of Interim Trail Use and Termination of Modified Rail Certificate*, STB Finance Docket No. 29910 (Sub-No. 1) (Oct. 4, 2004); *Sammamish Transportation Co. – Notice of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 33398 (Sub-No. 1) (Feb. 20, 1998). The South Carolina Parties' filing of a request for interim trail use, at a point in time where the need for service on the Line seems unlikely, shows their continuing interest in the Line, in maintaining ownership of the Line and in preserving the Line for future rail use.

consistent with the Board's implementation of national rail transportation policy.⁶ The Board already disposed of any argument that the South Carolina Parties have misused the modified rail certificate procedures.⁷ The Board properly authorized BRC's operation on the Line pursuant to the modified rail certificate and the filing of the Notice & Request does not invalidate such proper authorization.

Third, the Landowners' attack on the timing of the filing of the Notice & Request is baseless and should be ignored by the Board. The Landowners criticize the timing of the filing with two arguments – first, that the filing is further “evidence” that the South Carolina Parties' request for a modified rail certificate was a sham because SCSPA and BRC waited only nineteen months, and second, that the Landowners' unsupported (and previously rejected) challenge to BRC's modified rail certificate, an “essential predicate” for the filing of the Notice & Request, prevents such a filing.

As to the first argument, no provision in the Board's regulations or applicable federal statutes requires a rail carrier to hold out service indefinitely or places a time requirement on an owner's ability to request a NITU. *See* 49 C.F.R. § 1152.29 (outlining the requirements for issuance of a NITU). In fact, such requests have been made, and granted, in as short a time span as two months. *See, e.g., Sammamish Transportation Company – Notice of Interim Trail Use and*

⁶ The modified certificate procedure and the interim trail use procedures both advance “the congressional policy ‘of placing the states at the forefront of the federal effort to preserve local rail service’ and preserve ‘the Board’s jurisdiction over a rail line and rail corridor that would otherwise be allowed to be abandoned.’” Decision at 5 (internal footnote omitted)

⁷ The Board specifically rejected the Landowners' contention that “BRC's modified certificate notice [was] an improper device to convert the PRR rail corridor to interim trail use rather than to resume active rail service.” Decision at 4.

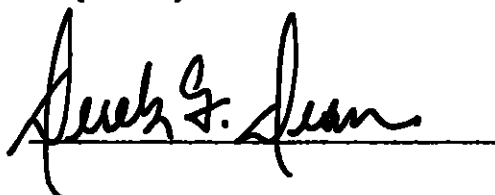
Termination of Modified Certificate, STB Finance Docket No. 33398 (Sub-No. 1) (Feb. 20, 1998). In *Sammamish Transportation Company*, the Board took no issue with Sammamish's filing of a notice of intent to terminate service and request for issuance of a notice of interim trail use only two months after Sammamish obtained a modified rail certificate to operate over a rail line owned by the South Dakota Department of Transportation. Here, SCSPA and BRC held out the Line as available for service for nineteen months. No meaningful shipper interest in service over the Line has materialized, and SCSPA cannot be expected to hold out service indefinitely under such circumstances

As to the second argument, neither the Landowners' petition for reconsideration nor the instant Response operate as a stay of the Board's Decision or prevent the South Carolina Parties' filing of the Notice & Request. See 49 C.F.R. § 1115.3(f) ("The filing of a petition [for reconsideration] will not automatically stay the effect of a prior action"). Certain requirements must be satisfied before a Board action may be stayed. First and foremost, the party seeking a stay of Board action must file a petition to stay within ten days of the service of the action. See 49 C.F.R. § 1115.3(f). The Landowners failed to follow the necessary steps to stay the Board's action, as embodied in the Decision, and cannot argue now that the Landowners' filings since the Decision stand as a barrier to the South Carolina Parties' Notice & Request.

Conclusion

For the above stated reasons, the South Carolina Parties request that the Board reject the Landowners' arguments and deny the Landowners' request to strike the Notice & Request as improperly filed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Derek F. Dean", is written over a horizontal line.

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Certificate of Service

I hereby certify that on September 11, 2008, I served the foregoing Reply in Opposition to Response and Motion to Strike on the following individuals by either U.S. First Class Mail or FedEx Overnight Mail as indicated:

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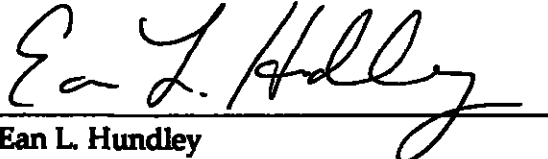
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